THE POPULAR MANDATE ON CONSTITUTIONAL AMENDMENTS.

THE enactment of the Eighteenth and Nineteenth Amendments has once more aroused popular interest in some of the fundamental problems of government. In the wide discussion which has ensued,[1] the legality of these measures has been questioned; much has been said of the encroachment of government upon individual freedom, and of the unwise extension of Federal power over matters of pre-eminently local concern. But apparently little effort has been made to ascertain what measure of the public will of the nation these Amendments represent. Even less interest is manifested in the question as to whether the existing procedure for providing changes in our fundamental law can, in fact, be utilized to express the public will with sufficient positiveness that a dissenting minority will ungrudgingly accept the decision by virtue of its allegiance to the principles of democracy.

If the Eighteenth Amendment was in reality the work of a small but determined minority,[2] possessed of an intensity of opinion on the prohibition question which overwhelmed their active opponents and posed as the popular will, this substitution

[1] D. O. McGovney, "Is the Eighteenth Amendment Void Because of its Contents?", 22 COLUMBIA LAW REV. 499.

Justin DuPratt White, "Is There an Eighteenth Amendment?", 5 CORNELL LAW REV. 113.

William L. Marbury, "The Limitation Upon the Amending Power", 33 HARV. LAW REV. 223; "The Nineteenth Amendment and After", 8 VA. LAW REV. 1.

William L. Frierson, "Amending The Constitution of the United States", 33 HARV. LAW REV. 662.

[2] "If the framers of the Constitution had been told that the time would ever come when a comparatively small but highly organized and determined minority could cause the legislatures of numbers of States to ratify Amendments to the Constitution of the United States contrary to the sentiments and wishes of a vast majority of the people of those States, recently manifested at the poles, the suggestion would have been received with absolute incredulity." William L. Marbury, "The Limitation Upon the Amending Power", *supra*.

should be exposed and measures should be taken to prevent its recurrence. And if the grant of suffrage to women by Federal Amendment has transferred to the central government a scope of power which it was not the intention of the people to remove from local control, it is incumbent upon them to re-examine the method by which this delegation of power is made lest the structure of this government be radically transformed by faulty governmental machinery.

The extraordinary conditions under which the two latest Amendments to the Federal Constitution were proposed and adopted renders well-nigh impossible an estimate of the extent to which they represent a rational and discriminating public judgment. So obvious was the necessity of war-time prohibition that the nation accepted it with that cheerful abnegation which for the time mastered the province of personal desires and united the people in the task of achieving a great and inspiring objective. It is by no means certain that the same spirit supported the Eighteenth Amendment and indorses the extreme rigidity of the Volstead Act. Just how earnest the public indorsement of this legislation is will, of course, be indicated by the manner of its observance and by the force of the movement for its modification.

Of the Suffrage Amendment, likewise, it may be said that the force of unusual circumstances gave impetus to its final enactment. During a war fought avowedly to preserve the principle of democracy in government it seemed indefensible longer to withhold from women the privilege of participation therein. Their effective contribution to the effort of the nation was a strong plea for a voice in the control of its future destinies. The demand for political equality between men and women contains an element of the abstract justice which daily tends to bring about their equality in economic rewards in so far as the services of the one are commensurate with those of the other.

It was upon this ethical aspect of the subject that the suffragists with great adroitness placed most emphasis. Into the foreground was projected the *abstract right* of women to the ballot. The fact that another issue was involved—the distribution of power between the central and the local organs of gov-

ernment, and that the control of suffrage is a question which many of the canons of wise government give to the local organs —this aspect of the subject was relegated to a position of unimportance. Women, so it was argued, were entitled to the ballot in the most comprehensive and conclusive manner. And, if a be-deviled legislator candidly admitted the justice of women voting, but ventured to assert that it was a measure with which the States were competent to deal, he was straightway accused of obstructing suffrage upon a pretext of irrelevant and secondary importance.

Yet whatever be the forces which wrote these latest provisions into our fundamental law, they are fixed now with all the rigidity which characterizes constitutional Amendments, and perhaps small profit can accrue from a re-opening of questions determined with such legislative conclusiveness. We may, however, with advantage re-examine the method by which changes in our governmental structure and social relations are brought about, and inquire if the existing procedure really serves the purpose of popular government.

I.

It seems important first, however, that a correct juristic understanding be had of the scope and potentialities of the Federal amending power. The nature of this power, the most fundamental one of a political society, should be made clear before the existing methods of its exercise are brought in question or proposals vouchsafed for the modification of accepted means. Are the people yet aware of the legal omnipotence of a two thirds vote in Congress subsequently ratified by legislatures or conventions in three fourths of the States? On a certain historic occasion, the representatives of the people in their zeal to confirm the unity of this nation gave their indorsement to a constitutional Amendment which came dangerously near bringing under the domain of the Federal government the great category of civil rights which the theory of this government relegates to the control of the separate States. Only through the prescience of the Supreme Court, in a decision[3] characterized

[3] The Slaughter House Cases, 16 Wall. 36.

more for its wisdom than for its logic, was this end averted. And curiously enough the impression persists that the Supreme Court will always be able or disposed to exercise this benevolent function.

> "The framers of the Constitution", says the Supreme Court in a recent opinion, "realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the fifth article." [4]

That these *changes* may be restricted as to content; that an Amendment to the Federal Constitution may be declared invalid by the courts if it operates to transform fundamentally the nature of this government, is the proposition which has been urged in some of the discussions on the validity of the Eighteenth and Nineteenth Amendments.

In sustaining the validity of the Eighteenth Amendment the Supreme Court confined itself to the brief statement that this particular constitutional provision was "within the power to amend reserved by such (the Federal) Constitution". [5] It refrained from discussing the abstract question as to the scope of this amending power. Perhaps the court considered it to no purpose to bring under popular review the logical and extreme degree to which sovereign power can be carried. But the nature of this power and its location in a body politic are matters of vital concern to those over whom it operates and to those intrusted with the power of determining the character of political institutions.

That the sovereign power of this nation resides in its people collectively considered and not in a portion thereof, and that it finds legal expression in the acts of their representatives when acting in the manner prescribed in the Constitution, seems a proposition too obvious to require re-statement.[6] And that it

[4] Hawke *v.* Smith, 40 Sup. Ct. 495, decided June 1, 1920.

[5] State of Rhode Island *v.* Palmer, 40 Sup. Ct. 486, decided June 7, 1920.

[6] The unanimous opinion of the court in Hawke *v.* Smith, *supra*, indeed re-asserts with much emphasis the theory of the Constitution emanating from the nation as a whole.

is a power which knows no legal restraint—that it may effect the most far reaching changes in the *quautum* of powers exercised by the central or the local organs of government; that it may recast absolutely the sphere of freedom enjoyed by the individual—are equally patent to those acquainted with the nature of sovereign power. To presume a limitation upon this power is to confuse two distinct political concepts, sovereignty, the ultimate authority within the state, and government, the machinery through which this power operates and permits the exercise of certain functions. This sovereign political society of the United States has made in the form of a fundamental law certain apportionment of governmental powers between two distinct sets of organs, and has placed certain limitations in favor of the individual upon these powers of government. It has provided, furthermore, a means by which this distribution of governmental powers may be changed and by which the sphere of individual liberty may be restricted or enlarged. When action to these ends is taken in the manner prescribed in the Constitution, there

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"'The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States.' McCulloch *v.* Maryland, 4 Wheat. 316. The states surrendered to the general government the powers specifically conferred upon the nation, and the Constitution and the laws of the United States are the supreme law of the land. * * * The fifth article is a grant of authority by the people to Congress."

The act of amending the Constitution is fundamentally an act of the people of the nation in their collective capacity, though both the national government and the governments of the States are commonly utilized to express the national will. In proposing Amendments, the people act through their representatives in the national government, but in confirming or rejecting these proposals, they act through their representatives in the governments of the separate States. The sovereign power may, however, be differently organized without utilizing the existing governments except for the purpose of initiating the procedure. This condition would obtain were the legislatures of two thirds of the States to make application to Congress for a constitutional convention, and the only function which Congress would then exercise would be to make the decisions as to the method of ratification of the work of the convention. If conventions for ratification were called in the separate States, the final sovereign act would have been consummated without recourse to the existing governments except for the purpose of formally organizing the sovereign power.

is no legal limitation on the transformations which can thus be accomplished.[7]

[7] "In scope the Amending power is not limited to but one subject, namely, the equal representation of the States in the Senate." 1 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, p. 521.

"It has at times been alleged that no amendment in violation of the 'spirit' of the Constitution or providing for a change in the essential nature of the American State would be valid. The argument in support of this view rests, however, upon a conception of the Constitution as a contract between the States." *Ibid.*

In this connection, the opinions of the publicists on the express limitation on the amending power contained in the Fifth Article of the Constitution are of interest.

"An amendment of the Constitution introducing the principle of representation in the Federal Senate on a basis of population, if not accepted by all the states, would be invalid, though approved by the powers which for every other purpose answer the description of a legal sovereign. But what would happen if the powers last referred to, approved of an amendment of the fifth section which omitted the proviso as to the conditions under which the states might be deprived of an equal representation in the Senate? It appears to me that the Courts would be compelled to hold such an amendment invalid until it had received the assent of all the states. The fifth section as it stands is evidently framed with the object of prescribing a sovereign organization which shall vary in constitution, not merely according to the will of certain parties, but also according to the nature of the proposed change. In other words, the famous proviso implies, not a limitation on the sovereign power, but a special organization of the sovereign power for a special purpose." JETHRO BROWN, THE AUSTINIAN THEORY OF LAW, p. 162 n.

Note, however, the interpretation given by Burgess.

> "From the standpoint of political science I regard this legal power of the legislature of a single commonwealth to resist successfully the will of the sovereign as unnatural and erroneous. It furnishes the temptation for the powers back of the Constitution to reappear in revolutionary organization and solve the question by power, which bids defiance to a solution according to law. * * * From this point of view all the great reasons of political science and jurisprudence would justify the adoption of a new law of amendment by the general course of amendment now existing, without the attachment of the exception; and in dealing with the great questions of public law, we must not, as Mirabeau finely expressed it, lose the *grande moral* in the *petite morale*." 1 POLITICAL SCIENCE AND CONSTITUTIONAL LAW, pp. 152, 153.

In the cases of constitutions which provide no means for alteration or amendments, it is generally held by jurists and publicists "that it is to be considered as tacitly understood, that amendments may be made either by the ordinary legislative method, or by the same power by which the constitution was originally adopted". Such was the construction given by Italian jurists when called upon to interpret the Italian Consti-

Upon a sovereign political society itself there exists always the practical limitation that its acts, though taken in the formal manner it has itself prescribed, shall not wantonly disregard the opinions and sentiments of the members of the political community. Unless deference is shown to these forces which ultimately condition the exercise of sovereignty, the path is laid open for a violent or an evasive attitude towards the law. If the acts of the sovereign power defy the dominant sense of its subjects as to what should be the nature of their political institutions, or if the sovereign authority is guilty of an outrageous restriction of the scope of individual action, revolution is the result. If the offense is of a less flagrant character, the protest takes the form of subterfuge and artifice to defeat the operation of law. But this type of action is always to be distinguished by its nature. It is essentially revolutionary in character, violently or silently subversive of constituted authority. It is not to be proposed that such action may not at times be justified. In certain conspicuous instances in the evolution of political liberty, it has served well the cause of freedom. But its justification is to be found in ethics and not in law, and, in a political society where sovereign authority and political freedom rest in the citizen body, it is assumed that their genius will regulate their form of government and safeguard their personal liberties through the procedure which has been regularly ordained.

The framers of the Constitution provided two methods by which the nation might express its sovereign will. The initiative in proposals for Amendments was granted to two thirds of both houses of Congress or to the legislatures of two thirds of the States. The proposed changes were to become effective only by the ratification of the legislatures of three fourths of the States or by conventions in a like number of States. The method of ratification was left to the choice of Congress. The Constitution gives no preference to these methods of initiation or to the alternatives of ratification. There is nothing in the Constitution which indicates a legal supremacy of one method over the other. "Both methods of ratification, by legislatures

tution which made no provision for its amendment. See WILLOUGHBY, THE NATURE OF THE STATE, p. 215.

or conventions, call for deliberative assemblages representative of the people, which it was assumed would voice the will of the people." [8]

The interesting distinction drawn by Mr. William L. Marbury, in a recent article in this REVIEW,[9] between the methods that may *legally* be employed in changing the provisions of the Federal Constitution—a distinction based upon the *nature* of an Amendment—would probably never be entertained by the Supreme Court of the United States. Mr. Marbury admits that "there can be little doubt but that *any* Amendment, however radical, which the people might choose now to adopt in the same manner in which they adopted the original Constitution, by assembling in conventions in each and every one of the States and acting favorably upon it, would be valid." In brief, Mr. Marbury would substitute for the methods laid down by the framers of the Constitution for the enactment of those changes which "the progress of time and the development of new conditions require", a rule which would require the unanimous consent of all the States. No more effective proposal could be vouchsafed for the realization of a condition against which Mr. Marbury elsewhere inveighs.

"It is the very essence of civil liberty that a people shall have the right to change their laws from time to time, and not be compelled to live under laws enacted in previous centuries by their ancestors which may have become totally unsuited to their changed conditions." [10] If constitutional changes required the unanimous consent of the States, we would indeed have embalmed laws enacted in previous centuries, perhaps unsuited to changed conditions, and the people would be deprived of all practicable means of constitutional change.

Furthermore, under this interesting innovation, to whom should be intrusted the power of deciding whether a proposed change should be inaugurated under the provisions of Article Five, or whether it should require the consent of "each and every State"? Should the matter be referred to the separate

[8] Hawke *v.* Smith, *supra.*

[9] The Nineteenth Amendment and After, *supra*, p. 1.

[10] The Limitation Upon The Amending Power, *supra*, p. 230.

States? If so, each State becomes endowed with a legislative veto over matters affecting the whole of the nation. It is not inconceivable that at some future time the people would desire to return to the State governments some of the powers delegated to the Federal government in the original instrument or by subsequent Amendment. Would this action require the assent of all the States at present composing the Union or only three fourths of the number? Should this momentous question as to the method of the organization of the sovereign power on a specific subject be vested in the Supreme Court? On the contrary, the Constitution expressly provides for the manner of its organization. The Supreme Court has very recently expressed its interpretation of the question. Commenting on Article Five, the court says:

> "It is not the function of the courts or legislative bodies, national or State, to alter the method which the constitution has fixed." [11]

One may well agree with Mr. Marbury on the potential dangers to local governments which the recent Amendments entail.[12] But it is the political wisdom of the representatives of the people which should be assailed; not their legal power.

The arguments of some writers based on opinions of the Supreme Court in such cases as Texas *v.* White,[12a] Lane County *v.* Oregon,[12b] and Collector *v.* Day[12c] to indicate a limitation on the amending power in the Constitution pass in cavalier fashion over the main point at issue. In giving these opinions the Supreme Court is interpreting the Constitution as it stands at a given period; it is not passing judgment on changes which may be wrought at some future time. The American people have happily thus far not abandoned the idea of a division of powers between the central and local organs of government, or as

[11] Hawke *v.* Smith, *supra.*

[12] See the article by Emmet O'Neal, "The Susan B. Anthony Amendment—Effect of Its Ratification on the Rights of States to Regulate and Control Suffrage and Elections", 6 VA. LAW REV. 338.

[12a] 7 Wall. 700.

[12b] 7 Wall. 71.

[12c] 11 Wall. 113.

the Supreme Court has expressed the theory, "an indestructible Union composed of indestructible States". To the end that this division of powers between the Federal government on the one hand and the State governments on the other might be maintained, the people have adopted a Constitution placing limitations on the powers of each. They have acquiesced in the sound principle of judicial construction which exempts the agencies and instrumentalities of the Federal or the State governments from taxation one by the other. At a given period, it may be reasonably said that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government". But constitutional provisions do not purport to control the sovereign people of the United States, but the governments. "The limitations upon State action set by law are obviously merely formal in character. They are self-set by the State and the same power which has decreed them still has the power to alter or abolish them, though this alteration or abolishment must be done in the formal and legal way." [13]

Mr. Justice Miller in his opinion in the Slaughter House Cases, after reviewing the consequences which would follow the construction of the Fourteenth Amendment in a certain manner, consequences which would radically change the whole theory of the relations of the State and Federal governments to each other, stated that the argument against such a construction "has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt".[14] But suppose the language of an Amendment were to express this purpose beyond doubt or cavil. Would the Supreme Court declare it invalid and presume therefore to defeat the will of the people expressed through their representatives in Congress and in the legislatures of three fourths of the States? Such a decision cannot rationally be anticipated. The guardianship of the "indestructible States" and of local government in this nation rests in the people, where, under a theory of popular gov-

[13] WILLOUGHBY, THE NATURE OF THE STATE, p. 214.
[14] 16 Wall. 36-78.

ernment, it should properly reside. Only through their vigilance can local government be preserved. Their continued response to humanitarian considerations in a total disregard of political principles is a regrettable relinquishment of power and control to a central authority. Such delegation of power is indefensible when it is obvious that the desired end may be obtained without the surrender of local autonomy.[15]

II.

The nature and location of sovereign power in a body politic must be stated with perfect clarity in order that its significance may be appreciated. Too long in the United States the advocates of local government, of decentralization, and of a theory of inalienable States Rights have reposed on the assumption that there is something inherent in the nature of this government which will preserve the balance between its central and local organs. On the contrary, there is no principle in American constitutional jurisprudence which should be more clearly understood than the fact that no such automatic legal restraint exists. An irreconciliable difference of opinion on the location of sovereign power in the United States provoked four years of devastating strife. It was resolved on the principle that it rests in the nation as a whole, and not in its separate political units. This decision has been affirmed upon every subsequent occasion on which it has been deemed necessary to invoke the determinate sovereign. The Constitution provides in Article Five the procedure necessary for the sovereign people to follow, if their acts are to have a legal validity. The organization of the sov-

[15] "To say that the Courts may strike down an Amendment proposed and ratified in the regular way upon the grounds that the Amendment is unnecessary, unwise, or not one contemplated by the framers of the Constitution, would be to add to the provisions of Article V and make it read that an Amendment proposed by Congress and ratified by three fourths of the States, should be valid, provided it would be approved by the Supreme Court. In other words, it would be to substitute the judgment of the Courts on a question of policy or expediency for the judgment of Congress and the legislatures of the States to whom the Constitution commits the matter." William L. Frierson, "Amending The Constitution of the United States", 33 HARV. LAW REV. 662.

ereign power thus prescribed is not an illiberal one even from the standpoint of those who fear the possible coercion of the majority. To make it more generous would be to erect a stalemate on change and progress and to carry the idea of the consent of the governed and self-determination to an extreme and illogical degree. It is futile to look elsewhere for this final sovereign power. To assume its location in the separate States is to propose a theory of political disruption; to urge its assumption by the Supreme Court is to renounce the theory of popular government.

From the standpoint of local government, there is nothing alarming in this construction. It merely clarifies a political and legal fact and projects the question of a centralized or a diversified form of government into the realm of practical politics. If the authority which is capable of making the distribution of powers be clearly understood, appeals may be made to it in favor of delegating great or small powers to the local or to the central organs of government.

Few contemporary questions are of more importance than that of the allotment of governmental powers. That a revival of the doctrine of decentralization is at hand, no acute observer can deny. The vitalization of democratic government is the problem which has immediately followed the attainment of democracy. The sullen resentment of vast numbers of people in the recent presidential campaign toward methods which had defied their will in the matter of nominees for the highest office in their gift did but attest a popular feeling of remoteness from the actual operation of government. The humanitarian impulse which led to the enactment of the Eighteenth Amendment took no heed of the practical problem of its enforcement. The negative sense of responsibility of local authorities on this question is notorious. Commands which emanate from Washington must often be accompanied by agents for their enforcement: not seldom do these agents find in local communities a connivance at evasion of the law rather than co-operation in its enforcement.

The privilege exercised by the women of the nation on November the second was likewise not without its price. Thou-

sands in the South felt more keenly the necessity of racial domination than the zest of enfranchisement. One may gladly admit their right to suffrage and yet reserve the opinion that it would best have come through agencies acquainted with local problems and responsive to local desires.

The case for local government continually re-asserts itself. Occasional impatience at its dilatoriness is inevitably followed by the conviction that it is in reality the enlivening factor in government. The mechanisms of a scientific age which in some respects promote a closer relationship between communities cannot establish a universality of conditions or a uniformity of opinions—they cannot transport a vigilance or pride over the acts of administrative officials who are not responsible to local control. The diversity of economic interests and social customs in the United States renders attempts towards their uniform regulation an invitation to lawlessness and discontent. Concessions must be made to these diverse interests; even to local prejudices. It is only through a policy of this sort that more formidable resentment is to be averted.

The expression which a movement will take to revivify government is problematical. That one of its phases should be a sober reflection on the part of the people before they strip further the powers of the States in favor of the Federal government cannot be too strongly urged. The proposals of recent writers that decentralization be made on a functional as well as a territorial basis arrest the interest of all who would make government a more vital interest in community life. Yet in their eagerness to intensify interest in government some of these advocates would dispose of the power to reconcile conflicts. The pluralists have not taken heed of the homely teaching of John Locke that "a known and indifferent judge" is essential to stability in a political society. A political philosophy of engaging interest is vitiated by an obscure and destructive treatment of sovereign power.[16]

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[16] See the works of HAROLD J. LASKI, AUTHORITY IN THE MODERN STATES; THE PROBLEM OF SOVEREIGNTY. G. H. D. COLE, SOCIAL THEORY; LABOUR IN THE COMMONWEALTH. M. P. FOLLETT, THE NEW STATE.

III.

We speak confidently of sovereignty residing in the people of the nation; yet the assertion requires certain modification. The legal and the political concepts of sovereignty are to be distinguished. "Sovereignty for the purpose of jurisprudence, sovereignty without qualifying epithet, may be defined as supremacy recognized by law." [17] Back to the visible legal sovereign there is, in popular governments at least, that "catalogue of influences", as Woodrow Wilson expresses it,[18] which ultimately conditions the exercise of sovereign power. But these influences, this political sovereignty, in order to have legal validity must be exercised in a certain manner—in other words, expression must be had through the mouth of the legal sovereign.

A very recent decision of the Supreme Court illustrates the relation between the political and the legal sovereign power in the American constitutional system. Refusing to sustain the referendum provision of the Ohio State Constitution on Amendments to the Federal Constitution, the court declared:

> "Referendum provisions of State Constitutions and statutes cannot be applied in the ratification or rejection of Amendments to the Federal Constitution without violating the requirements of Article 5 of such Constitution, that such ratification shall be by the legislatures of the several States, or by conventions therein, as Congress shall decide." [19]

The implication is clear, therefore, that legal sovereignty in the United States rests in those bodies which are capable of altering or amending the Constitution. The effort of the people of Ohio to exercise directly this prerogative of legal sovereignty cannot be reconciled with the requirement of the Constitution for the organization of the sovereign power. They may utilize their political freedom to determine the complexion of the body which is the legal agent of their will, but having exercised this right, their legal powers are exhausted.

There is evidence, however, that the people are not convinced that legislatures in acting upon Federal Amendments will al-

[17] JETHRO BROWN, THE AUSTINIAN THEORY OF LAW, p. 281.
[18] AN OLD MASTER AND OTHER ESSAYS, p. 78.
[19] Hawke *v.* Smith, *supra.*

ways express their will. It has been frequently charged by critics of the Eighteenth and Nineteenth Amendments that the legal agents of the people were not in happy accord with the wishes of their constituencies on these questions. The people of the State of Ohio had attempted formally to "reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed Amendment to the Constitution of the United States." [20] The provision of the Tennessee Constitution is further evidence of popular unwillingness to delegate to legislative bodies uncontrolled authority on the ratification of Federal Amendments. The attempted safeguard is embodied in the Tennessee Constitution in the following words:

> "No convention or General Assembly of this State shall act upon any Amendment of the Constitution of the United States, proposed by Congress to the several States, unless such convention or General Assembly shall have been elected after such Amendment is submitted." [21]

And, although the Supreme Court may hold that the Tennessee Constitution exceeds its legal competence [22] in imposing this restriction on the State legislature or convention, there can be no doubt that the people of Tennessee are seeking to bring the organ which speaks their voice on a sovereign act in the United States into complete conformity with their will. The provision may well be classified as a "political understanding" between the people of Tennessee and their representatives. Even if it imposes no legal restraint on the actions of the latter, what may be said of the moral obligation to which they were subject? The recent election in Tennessee indicates that the people did not regard lightly the failure of their representatives to observe the agreement.

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[20] Amendment to the State Constitution, adopted at the General Election, November, 1918.

[21] Art. II. Sec. 32.

[22] The provision of the Constitution of Tennessee cited above raises the interesting question of the legal competency of State Constitutions to prescribe the conditions under which State legislatures may ratify Amendments to the Federal Constitution. The point was not covered

The relationship which should exist between the legal and the political sovereign in a political society is one of the eternal problems of government. For Rousseau, to be sure, the problem did not exist. Legislative power remains always with the people and there can legally be no delegation of power other than authority to execute the general will.[23] Unwilling to accept this political absolutism of Rousseau, one is brought immediately face to face with the problem of the function of the representative.

The way to compromise is open only if we admit a distinction between the nature and importance of questions which are presented to a body politic. The failure of the advocates of the initiative and referendum to seize the fundamental distinction between laws upon which the public may or may not be able to pass competent judgment is responsible for much of the disappointment which has followed the employment of those devices. Due consideration was not given to the limits of public opinion. It was futile to presume a public information on, or active interest in, the great mass of technical legislation which confronts a legislative assembly. "In order," says Mr. Lowell, "that there may be a real public opinion on any subject, not involving a simple question of harmony or contradiction with settled convictions, the bulk of the people must be in a position to determine of their own knowledge, or by weighing evidence, a substantial part of the facts required for a rational decision." [24] Far from possessing these facts on most legislative proposals, the people show no disposition to acquire them; indeed they cannot assume functions which are essentially expert in their nature. Accordingly we have the present movements for the introduction of the short ballot, the employment of experts in local government, and a desire to reconstruct the State governments, concentrating authority and responsibility. Upon the mass of governmental measures, the people are content to

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in Hawke *v.* Smith; that decision merely eliminated the popular referendum as a legal substitute for the representative method of ratification.

[23] THE SOCIAL CONTRACT, Bk. II. Chap. III.

[24] PUBLIC OPINION AND POPULAR GOVERNMENT, p. 24.

trust the services of the representative, deeming his periodic accountability to them a sufficient safeguard.

But with measures of a more fundamental nature, what of these? When the question is one which may involve a fundamental change in the structure of the government; when social relations are involved; when the legislation is relatively permanent in its nature and presumes a deliberate judgment on the part of the nation; should not a popular consultation of the electorate be held? Concretely, is a proposal to amend the Federal Constitution one which lends itself to the formation of a definite public opinion? Conceding the formation of a general will on the subject, does the governmental machinery which we are accustomed to utilize in enacting Amendments insure the expression of this public judgment?

The Ohio referendum provision and the limitation on the legislature attempted in Tennessee are significant indications of a trend in the public mind. They indicate an effort on the part of the people to exercise a direct legislative voice on Amendments to the Federal Constitution. In many respects it is surprising that this movement has not heretofore gained headway. It has long been an almost universal practice within the States themselves that the work of a constitutional convention or proposals to amend an existing Constitution should receive popular ratification.[25] It is not unnatural that the people should be casting about for some means to insure the dominance of their will on even more fundamental questions.

To achieve this end we have not thus far carried the doctrine of popular sovereignty to the extent which other peoples, committed to the theory of popular government, have seen fit to employ it. Perhaps the most outstanding development in English political institutions within the past decade has been the tendency, in matters of vital importance, to consult the electorate before final legal action is taken.[26] The Constitution of

[25] Says Munro: "In one or two States of the Union, the people have not yet acquired this determining power, but in the great majority of them nothing nowadays goes into the constitution without the assent of a majority of those who vote upon the questions at an election." THE GOVERNMENT OF THE UNITED STATES, p. 411.

[26] OGG, THE GOVERNMENTS OF EUROPE, p. 178.

the Commonwealth of Australia [27] expressly provides that alterations of the Constitution must be had only by an absolute majority in the two houses, followed by submission to the electors in the Commonwealth. The new German Constitution presents an interesting combination of representative government and of popular sovereignty in its provision for Amendments. Constitutional changes become effective when passed by a two thirds vote in the national legislative assemblies. Furthermore, without respect to the wishes of the representatives, an Amendment may be proposed and adopted by the people, the assent of a majority of voters being necessary for adoption.[28]

That constitutional provisions present questions upon which a genuine and trustworthy public opinion may be formed is an assumption open indeed to dissent. Certainly the affirmative of the proposition assumes a people schooled in the art of self-government, possessed of an interest in public affairs, and tolerant of compromise. It assumes, furthermore, that propositions will not be put forward for inclusion into a Constitution which in reality have no place in a body of fundamental law. The effectiveness of written Constitutions is manifestly destroyed if they are made to include matters properly within the domain of ordinary legislation and upon which public opinion is capricious. Limited to questions relating to the organization of governmental powers and avoiding the detailed regulation of social and economic questions, constitutional proposals may reasonably be expected to receive a judicious judgment by an electorate.

The history of popular referendum on constitutional provisions in the American States indicates that these questions have not failed to call forth a discriminating popular verdict. Not seldom have the people failed to give their assent to proposals submitted for their indorsement or rejection. The records show on the whole a wholesome balance between measures which have been accepted and those which have received rejection. Summarizing the results in Massachusetts, Mr. Lowell comments:

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[27] KEITH, IMPERIAL UNITY AND THE DOMINIONS, p. 396.

[28] Art. 76.

> "A survey of these sixty cases leaves the impression that, while the people were sometimes less progressive than their representatives, almost all the popular votes of doubtful wisdom were either in accord with the best thought of the time or were afterwards reversed. There can certainly be no doubt that the referendum on constitutional questions retains general respect in the United States, for the institution is as firmly rooted as ever and no one would seriously propose its abolition." [29]

Yet even if the referendum on Amendments to the Federal Constitution is an innovation of doubtful political wisdom, there are nevertheless compelling reasons why the present practice of ratification should be abandoned. The matter is not one properly within the province of the legislatures of the States, and if ratification is to be a representative function, Congress should exercise its prerogative of calling conventions in the several States through which the people may voice their assent or disapproval. As the Supreme Court has recently said: "Ratification by a State of a constitutional amendment is not an act of legislation within the proper meaning of the word. It is but the expression of the assent of the State to a proposed amendment."

If not a legislative act, why, therefore, should the State legislatures be intrusted with this function? Legislators may be eminently capable of discharging legislative functions and yet not necessarily be qualified to represent the people in ratifying a constitutional Amendment. The two functions are separate and distinct; the one relates to the exercise of governmental powers already delegated by the people; the other is to voice the sovereign will itself, to increase or to diminish the powers intrusted to a legislative assembly. The legislator may legitimately be chosen for his skill and efficiency in handling problems of ordinary legislation. He will perhaps not combine with these qualities the broad sympathy and sound judgment which

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[29] PUBLIC OPINION AND POPULAR GOVERNMENT, p. 171.

See OBERHOLZER, THE REFERENDUM IN AMERICA, pp. 163-164, for detailed accounts of constitutional Amendments adopted or rejected by popular vote in the various States.

should characterize the representative of the people in a sovereign act.

An equally manifest superiority of the convention system for acting on Amendments lies in the fact that it presents a conceivable means through which these questions may be removed from the realm of party politics, if indeed it be possible in America to place any political function beyond their control. The spectacle of the Democratic and Republican parties vying with one another to indorse opportunely the Eighteenth and Nineteenth Amendments invalidates at once the assured claim of these measures to public indorsement and registers an activity of political parties quite beyond the realm of their legitimate scope. So accustomed have we become to regard parties as necessary agencies for popular government that the danger is imminent that they will become abstractions for political worship rather than a medium for the expression of a public will. The zeal to intrust a party organization with the resolution of an issue, seeking to create vantage for it thereby, may well lead a democracy to surrender the intrinsic merit of the issue to the requirements of party expediency. The unfortunate consequences of this course need not be cited. It obliterates that sphere of moral and political activity in which the members of a democracy are presumed to act as a community rather than as members of party organizations, and with this common ground destroyed, the state becomes a conglomeration of particularist interests incapable of a public will. If such a will is not to be reflected in constitutional provisions, it is indeed futile to assume its existence in a political society. Certainly in a constitutional convention it may more genuinely be expressed than in avowedly partisan legislatures.

The decision in Hawke *v.* Smith eliminates the referendum on Federal Amendments in so far as they may be attempted by the authority of the separate States. The only alternatives, therefore, are to amend the amending clause of the Constitution with this end in view, or else introduce a constitutional practice which would make possible the same result and yet fulfill the requirements of Article Five. It is to no purpose to agitate for an Amendment which definitely commits the nation to pop-

ular ratification when the same end may more cautiously be approached without "tinkering with the Constitution". If Congress in the future will exercise its prerogative of calling conventions in the several States, the ratification of an Amendment may automatically become an issue for decision by the electorate, if the temper of the nation requires such action. In those States which are demanding a direct legislative vote by the people on Federal Amendments, the election of a representative to a ratifying convention may well be conditioned upon his declared attitude upon the proposed Amendment. And elected with a definite mandate from the people, a delegate would scarcely dare to defy their will. His obligation would be considered as binding as that which at the present time compels a presidential elector to vote for the candidate of his political party. Through a similar political understanding, the popular election of Senators was achieved in many States long before the adoption of the Seventeenth Amendment.

The practice of calling constitutional conventions in the separate States would preserve, therefore, the representative principle in ratifying Federal Amendments, and at the same time open up a cautious approach to the practice of submitting them to the electorate. The one or the other practice might be made to prevail in the various States, in accordance with the desires of a particular constituency, final legal action being, of course, necessary in the formal act of the convention.

The method would develop only another "convention of the constitution" similar to those already operating, the one regulating the election of the President being the most outstanding one. Political understandings of this nature between the people and their representatives afford an effective and unobtrusive medium for constitutional growth. Often they may be used to bring the formal provisions of a Constitution into accord with the progressive political sentiments of a people without recourse to formal legal changes.

Without doubt, we are on the outskirts of a popular movement which demands for the people a more direct voice in the enactment of Federal Amendments. The logical way to meet

that demand is for Congress, in submitting Amendments, to utilize the provisions of Article Five and call for ratifying constitutional conventions in the separate States. The people of the State can then be relied upon to choose a genuinely representative body to voice their will, or distrustful of this method, they can, through the force of public opinion, demand that the convention legally confirm a verdict which has been pronounced in the selection of representatives to the convention.

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